IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1059

HAROLD A. ROSE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner

vs.

PILOT FREIGHT CARRIERS, INC., ET AL,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

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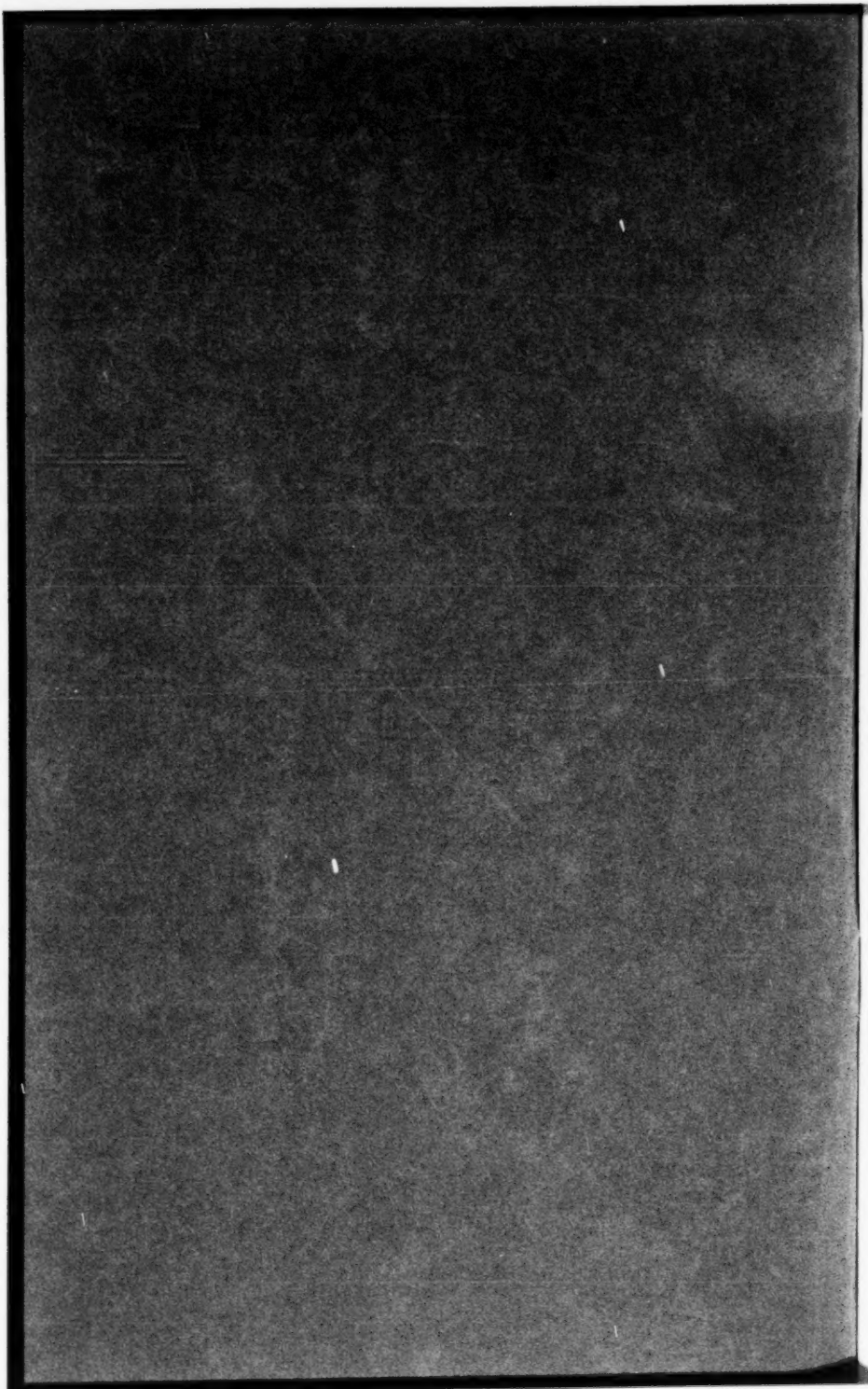

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IN THE

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HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
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vs.

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

A. The Question Which The Petition Seeks To Present To This Court Is Moot

The question presented here, as framed by the Petitioner, is whether the District Court should have issued an "interim bargaining order" because of the existence of an employment atmosphere which would "preclude the holding of a fair" union representation election.

That issue does not presently exist in this controversy — and has not existed during the last year and a half — because it was resolved in August 1974, when Pilot Freight Carriers, Inc. ("Pilot" or the "Company") and Truck Drivers Local Union No. 512, affiliated with the International Brotherhood of Teamsters (the "Union") entered into a strike settlement agreement which rendered a District Court-imposed "interim bargaining order" totally unnecessary, even if it be assumed *arguendo* that the Court had authority to issue such an order.

The chronology of events was as follows. On various dates in February 1974, Pilot officials were alleged to have violated the Labor Act at the Company's Jacksonville, Florida, terminal by making threatening and coercive statements to employees during an organizational campaign which had just begun. Additional allegations of a similar nature were made against Pilot in March.

On May 13, 1974, the Board petitioned the District Court for interim injunctive relief against Pilot in Jacksonville pending a hearing and decision by the Board on these allegations. The District Court scheduled a hearing for May 16, 1974. The Board claimed such an urgent need for an injunction that it opposed even a brief continuance in order to allow Pilot's lead counsel to be present. The proceedings before the District Court on May 16 can best be described as an *ex parte* hearing, because, although the Board was allowed to present live evidence through witnesses, that opportunity was denied the Company. Pilot was forced to submit its defense in the form of affidavits and exhibits.

On June 28, 1974, the District Court entered an injunction restraining Pilot in significant respects — primarily upon the Board's allegations which Pilot had been denied an effective opportunity to rebut. The Court did not, however, order the Company to engage in interim bargaining. At that point, therefore, the questions of recognition and bargaining were still unresolved.

This situation did not continue long, however. On August 15, 1974, Pilot and the Teamsters Union signed an agreement which established a method of resolving the question of recognition for the dockworkers at the Jacksonville terminal, and, as to owner-operator drivers, that is, the local and road drivers — established the hours of work, rates of pay, and other terms and conditions of their employment (See Appendix D to the Petition, and Appendix A to this Brief).

This agreement eliminated any continuing questions about the "election atmosphere", for no election was necessary thereafter. All questions of whether the passage of time pending Board decisions would make the Board's remedies "impotent" became moot. No judicial remedies were needed in order to insure a fair resolution of representation questions — because the parties agreed to their own private method of resolution of these questions.

Whatever is considered to have been the "status quo" in May 1974, which the Board at that time was contending needed to be preserved, that status was changed by agreement of the parties in August 1974. Thus, if this Court should now direct the District Court to attempt to reconstruct the status quo of May 1974, it would be destroying

the vitally important agreement which established a different status acceptable to all of the concerned parties. There is no need for an interim bargaining order to preserve the status quo while the Board decides questions pertaining to recognition and bargaining. A mutually satisfactory method of resolving those problems was agreed upon by these parties long ago.

The whole thrust of the Petition erroneously assumes that "the employer's continued refusal to bargain with the Union pending the outcome of the unfair labor practice proceeding" requires an "interim" bargaining order. But this entirely overlooks the fact of the August 1974 agreement which effectively ended the employer's refusal to deal with the Union with respect to the Jacksonville terminal, and established procedures for resolving the problems between the Company and the Union on a basis acceptable to all interested parties.

Tacitly recognizing that this agreement substantially destroys its contention in support of a continuing need for an "interim bargaining order", the Board falls back on an utterly fallacious argument, which in plain terms is to the effect that it did not want the bargaining to come out the way it did — that is, the Board did not approve of the substance of the agreement reached by the parties. For the Petition asserts, albeit by footnote, that what the Board wants is an "interim" order which would make "both" Pilot and BBR recognize the Union as the representative of a "combined unit" of drivers and dockworkers.

The highly contrived nature of this argument is apparent at once. The Labor Board is not authorized to approve,

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veto, or alter labor agreements. Here, the parties agreed to have one resolution as to the dockworkers and another for the drivers. This is traditional in the unionized trucking industry, and it would be the height of absurdity for the agreement of the parties to be cast aside on the theory that the bargaining units should not have been separated through such agreement. There is no public policy which would prevent the parties from agreeing upon separate units. In hundreds of representation cases, the Board has approved or ordered such a division of units.

The argument that the contract should be disregarded because it was only between Pilot and the Union, and did not include BBR, is similarly as absurd. In the first place, the Union and the Board have from the very beginning contended that BBR is merely a paper corporation, and that Pilot is the real employer. The Union was satisfied with a contract signed only by Pilot, and it is not proper for the Board to seek by way of injunction, the addition of another party to that agreement. Furthermore, the Board has found that Pilot was to be considered the employer, or at least a joint employer, of the dockworkers. The Petitioner cannot properly be permitted to pursue totally inconsistent courses — on the one hand claiming BBR is to be ignored, and on the other claiming that the contract is deficient for not including BBR.

Thus, when placed in its true factual context, the only controversy that the Board can realistically contend exists here is whether the District Court should have entered an "interim bargaining order" requiring "both" Pilot and BBR to bargain with the Union for a "combined" unit of

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drivers and dockworkers. This is not an issue or controversy which exists between the parties. It is purely and simply an issue manufactured by the Board in its struggle to find — or create — some controversy in this case where none actually exists.

The inescapable fact is that this artificial "controversy" does not exist; and if it did, it could not be resolved in any event by an injunctive order which would destroy the agreement arrived at by the parties through the very process which a court-enforced bargaining order is theoretically designed to encourage.

Precisely the same issue here involved was presented to this Court in *McLeod v. General Electric Company*, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967). In that case, the District Court and the Court of Appeals differed regarding the proper standard which should be applied in any request for an injunctive order under Section 10(j) affirmatively requiring "interim bargaining". However, after the Court of Appeals decision, the parties made an agreement, and in light of this supervening event, this Court said, "The controversy over the proper standard for injunctive relief is immaterial if such relief is now improper whichever standard is applied." 385 U. S. at 535, 17 L. Ed. 2d at 590.

In that case, this Court remanded the action with directions that the District Court determine in the first instance what effect this supervening event should be deemed to have had on the appropriateness of injunctive relief. It should be noted, however, that the District Court had *granted* an injunction requiring interim bargaining. In the

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instant case, both the District Court and the Court of Appeals agreed that a mandatory injunction was inappropriate. The subsequent agreement between the parties is all the more reason for concluding that a remand for further consideration of the question by the District Court is not only unnecessary, but actually improper.

B. No Conflict In the Circuits Exists In This Matter

The Petition has asserted that the question here involved is whether the District Court "has authority" to issue an interim bargaining order. This is clearly not the case. The real question which was at issue before the District Court was whether it had authority to issue, *or to refrain from issuing*, a bargaining order in light of the facts before it. The Board is necessarily contending here that this Court should strip the District Court of any discretion in this regard — and should force the District Court to issue an interim bargaining order. This is clearly not the presentation of facts — "facts" which later turned out to be substantially erroneous. No court has done that, nor is it expected that any would do that, and there is no conflict in the Circuits about the matter.

The statute itself decrees that the District Court should issue an injunction only in circumstances where it would be "just and proper." This necessarily means that under certain factual circumstances an interim bargaining order would not be just and proper. This Court's decision in *McLeod v. General Electric Company*, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967), shows that discretion

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rests initially in the District Court to decide "upon the appropriateness of injunctive relief."

The test stated by the District Court and the Court of Appeals in the instant case was "whether injunctive relief is equitably necessary, or, in the words of the statute, 'just and proper' " (3a).[1] The Court of Appeals recognized that this test of "equitable necessity" confers a "certain range of discretion upon the trial court, reviewable for abuse" (12a). The Court said "some measure of equitable principles come into play here" and "if the trial court, in its discretion, does not believe that far-reaching mandatory relief would serve the purposes of the Act, it need not grant the full remedy requested by the Board. The Chancellor does not abdicate his powers merely upon a showing that the Regional Director's theories surpass frivolity." The Court below cited and relied upon *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d 1230 (2nd Cir. 1974) in support of this proposition — where it was said that the District Court "maintains some power to do equity and mold each decree to the necessities of the case" (14a).

The District Court in the instant case granted some of the injunctive relief requested by the Board, but did not command interim bargaining. The only basis on which this decision, at the time of its issuance, could have been challenged for its refusal to direct "interim bargaining", was that the employer might have been allowed to avoid bar-

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[1]Unless otherwise specified, references are to the Petition and the Appendices thereto.

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gaining for so long a period that, by the time the Board completed its procedures to compel bargaining, the result could have been rendered meaningless because of an intervening erosion of union strength. However, none of that happened here, since bargaining was voluntarily begun and an agreement was reached two months after the District Court's ruling. The whole issue then became moot. The subsequent events proved the District Court was correct in declining to force bargaining on the record before it. Furthermore, the Fifth Circuit was fully justified in its doubt "that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover" (18a). In light of subsequent events, the non-bargaining status only continued for two months after the District Court ruled and the method of resolving the recognition questions had already been agreed upon at the time of the Court of Appeals decision.

There is nothing to indicate that the Second Circuit would have reached a different result based on the facts in this case. In *McLeod v. General Electric Company*, 366 F. 2d 847 (2nd Cir. 1966), the standard applied by the Second Circuit was whether the Board had demonstrated that an injunction was necessary, under the facts of that particular case, "to prevent irreparable harm." In the instant case, the Fifth Circuit said that the District Court was within its discretion to find that in the absence of interim bargaining the Union would suffer no harm from which it could not recover (18a). There is nothing to indicate that the Second Circuit would have ruled otherwise if this case, with its facts, had been brought before that Court.

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Also in *McLeod,* the Second Circuit stressed the "extraordinary nature" of the injunctive remedy in the labor field. It recognized that the entire scheme of the National Labor Relations Act envisaged a system where the Board would, in the first instance, consider and decide issues arising under the Act. The Court evidenced the need to be "ever mindful of the dangers inherent in conducting labor management relations by way of injunction." *McLeod v. General Electric Company,* 366 F. 2d at 849-850. Its holding was that:

> "We are not convinced that the facts in the present case reveal those special circumstances which must be present before a court will intervene and issue an injunction prior to the Board's hearing and decision. The Board has not demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm. . . . It would be more in keeping with the scheme intended by Congress to have this case, particularly because of its unusual characteristics, follow the path of Board hearing and decision on the unfair labor practice charges, rather than to shortcircuit the established administrative design. . . ."
>
> *McLeod v. General Electric Company,*
> 366 F. 2d at 850

The same issue was before the Second Circuit in *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d 1230 (2nd Cir. 1974). In that case, the Court squarely rested the determination of the appropriateness of injunctive relief in the District Court, upon the particular facts and circumstances before it.

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"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."

Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F. 2d at 1241

The Court quoted from Justice Douglas' classic opinion in *Hecht Company v. Bowles,* 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944) that:

"A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

Hecht Company v. Bowles, 321 U. S. at 329, 88 L. Ed. at 760

The Court in *Danielson* went on to say:

"This court has previously held that a district court should apply general equitable criteria when the Board seeks an injunction under §10(j). McLeod v. General Electric Co., 366 F. 2d 847 (2 Cir. 1966), vacated as moot, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967)...."

Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F. 2d at 1242

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The opinion of the Court was that the Board's position would take away that discretion and, in effect, require a "complete judicial abdication by the district court." *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d at 1230. This position, of course, was not accepted by the Court.

The case of *Seeler v. Trading Port, Inc.,* 517 F. 2d 33 (2nd Cir. 1975), is not inconsistent with the above, nor is it in conflict with the decision in the instant case.

First, it must be considered that the issue before the District Court in *Seeler* was in a substantially different posture than in the instant case. In *Seeler,* the adversary hearings before the Board's Administrative Law Judge had already been completed. All the evidence had been adduced and the defendant had been given a forum for effectively presenting its defense. Thus the District Court had before it a fully developed transcript and evidence — "the parties stipulated that the record of the hearings before the Administrative Law Judge was complete and no other evidence was necessary." 517 F. 2d at 36. Just the opposite was true in the instant case. Not only was the record incomplete, Pilot was not even allowed to present its witnesses. When finally, months later, it had an opportunity to present its evidence before the Board, the charges directed against Pilot officials were dismissed.

In the *Seeler* case, because of the complete and full record, there was "no doubt" that the employer had engaged in an "extensive campaign of serious and persuasive unfair labor practices" which, unless checked, would "rend-

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er totally ineffective" the "Board's adjudicatory machinery." 517 F. 2d at 37-39. The Court could clearly see on that record that the employer's conduct, unless enjoined, might "undermine majority strength and impede the election processes." 517 F. 2d at 37. Accordingly, the Court concluded that "under these circumstances," "further delay may make such bargaining impossible in the future." 517 F. 2d at 39.

All that *Seeler* held is that the District Court "has the power" to order immediate bargaining when it, the District Court, finds factual circumstances that such an order is necessary "to prevent irreparable harm to the union's position" and to prevent such harm to the "adjudicatory machinery of the NLRB, and to the policy of the Act in favor of the free selection of collective bargaining representatives." 517 F. 2d at 39.

The Fifth Circuit — given those conditions — would probably not disagree. In fact, the *Seeler* opinion cites the Fifth Circuit's *Boire v. IBT* decision[1] as precedent for its ruling. See *Seeler v. Trading Port, Inc.*, 517 F. 2d at 39.

In the instant case, no irreparable harm to the Union's position resulted. No harm to the Board's adjudicatory machinery occurred. The policy of the Act to allow the free selection of representatives cannot be said to have been violated, because the Union and the Company agreed

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[1]*Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 479 F. 2d 778 (5th Cir. 1973).

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upon a method of selection which was well within the realm of public policy considerations.

The circumstances faced by the Fifth Circuit in the instant case did not convince the Court that irreparable harm would result or that the Board's remedies would be frustrated. This later proved to be a correct view of the facts. Had the Court been faced with a more severe situation where there was, in the words of the Second Circuit, "no doubt" about irreparable harm to the Union, to the Board's remedial processes, and to Labor Act policy, the Court, in light of the *Boire* case, probably would have agreed with the Second Circuit that the District Court "ha[d] the power to order immediate bargaining." See *Seeler v. Trading Port, Inc.*, 517 F. 2d at 39; *Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 479 F. 2d at 778.

Obviously this Court should not grant certiorari to allow a general debate regarding the power of the District Courts to grant injunctions for interlocutory bargaining. That question necessarily must be resolved upon the special factual considerations existing in each case. In the instant case, the factual controversies have been settled. The issue, therefore, necessarily would be presented hypothetically — which prevents a meaningful resolution from being achieved. That debate should be postponed to another day, when appropriate facts are before the Court.

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C. The Board's Delays In Resolving The Issues In This Controversy And The Decision Finally Reached By The Board Both Demonstrate That Interim Bargaining And Reinstatement Were Inappropriate Here

A final brief word should be added here on two subjects.

First, the Board's actions in this case amply demonstrate that it did not deem the matters which were in controversy here to be of such urgency that it needed to complete its processes with dispatch.

The allegations against Pilot occurred, primarily, in February 1974. The Board waited until May 1974 to seek an injunction. The Board's Administrative Law Judge heard all the evidence in July and August 1974 and he made his decision in December 1974. The Board deliberated until March 26, 1976, at which time it substantially accepted the recommended decision of the Administrative Law Judge (Appendix B to this Brief). Had it been faced with such a consuming need to prevent its remedies from becoming impotent by the passage of time, it certainly could have speeded up the process itself. There was nothing so novel or unusual about the case that would justify its expenditure of over two years on these matters.

Secondly, the Board's Petition to this Court omits and mischaracterizes a number of important facts which substantially exculpate Pilot officials and representatives.

The Board has presented its statement of facts as if Pilot must be assumed by this Court to be guilty of a wide-

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ranging assortment of violations of the Labor Act. For this assumption, the Board directs this Court's attention to testimony *before the District Court* which Pilot was not allowed to refute by presenting rebuttal testimony from its witnesses.

Furthermore, and this is the essential point, when Pilot was allowed to present its witnesses before the Board's Administrative Law Judge, Pilot was vindicated in every instance. The Board's charges directed against Pilot officers and officials were dismissed by the Administrative Law Judge and the Board adopted his findings and conclusions (Appendix B to this Brief).

Therefore, it can be said that, in substantial respects, the Board's Petition has attempted to draw strength from factual allegations and assertions against Pilot which the Board itself has already found to be untrue and unsupported.

For instance, the Petition asserts that Roy Brace was one of the "Union's principal employee organizers" and he was "discharged" on February 7, 1974. The Board says that the District Judge committed error in not reinstating Roy Brace and that this Court should order Brace reinstated pending the outcome of the Board proceedings to determine whether this discharge was motivated by Brace's union activities (6, 20). What the Petition fails to point out is that the Board itself has already decided the discharge of Brace had nothing to do with union activities and the Company had no knowledge of any such activities on his part at the time (103a).

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Similarly, the Petition recites, as a fact that this Court should presume, that Pilot officials "threatened" its "truck-drivers" with "financial loss if they chose to have the Union represent them, and certain new benefits were announced at the meetings with the promise that additional favorable changes would be made when the union question was taken care of" (7). Here again, the Petition refers the Court *to testimony and findings before the District Court*, which Pilot was not given an opportunity to rebut with live witnesses. Even more importantly, the Petition fails to point out to this Court that when these allegations were tried out before the Administrative Law Judge, he absolved Pilot of wrongdoing as to these instances, and these findings have also been accepted by the Board (61a-91a).

The same observation is true as to the Petitioner's assertion that "Pilot Freight officials solicited individual groups of employees to return to work, promising them additional benefits if they did so" (8). When this allegation was tried on the merits, it was dismissed (85a-89a).

By this process of presenting only one side of the evidence to this Court — and presenting as fact assertions which the Board itself, after full hearing, has already rejected as untrue — the Petitioner has attempted to distort and magnify out of proportion the wrongdoing it accuses Pilot of here. An examination of the Board's decision on these matters, as reflected in the Administrative Law Judge's findings, shows that Pilot was substantially exonerated from the charges upon which the Board sought to have the injunction entered (61a-93a).

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Instead of a picture of massive and pervasive violations by Pilot officials, the true picture — which the Board must concede—is that not a single allegation it leveled against Pilot was proved. Its only tangible basis for making any claim against Pilot is on the theory that Pilot was a "joint employer" of the dockmen along with BBR and that accordingly Pilot must be made to suffer for a limited number of statements and actions by an official of BBR.

This factual background clearly shows the Petitioner to be grasping and overreaching in its presentation to the Court in order to obtain a grant of review which could not be hoped for upon an accurate factual understanding of this matter.

CONCLUSION

Upon all of the foregoing, Pilot Freight Carriers, Inc., earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectively submitted,

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
Attorneys for Pilot Freight Carriers, Inc.

APPENDIX A

BLEED THROUGH

August 15, 1974
Winston-Salem, North Carolina

Memorandum of Agreement

Pilot Freight Carriers, Inc., hereinafter called "Company," and Teamsters Local 512, hereinafter called "512," agree as follows:

1. It is agreed that the question of recognition for dock workers at the Jacksonville, Florida terminal is to be resolved by the decision of the National Labor Relations Board in litigation pending at this time. It is further agreed by the Company and 512 that no effort will be made by either party hereto, to reopen the record in that pending litigation, or to use this agreement to influence the National Labor Relations Board or the Courts in their final determination of that pending litigation. It is further agreed that the final decision of the NLRB or the Courts in such litigation shall not nullify this agreement as to the drivers at the Jacksonville, Florida terminal.

2. It is agreed that the question of recognition for owner-operator drivers (local and road) is to be resolved by a card check of all owner-operator drivers of record as of February 14, 1974, at the Jacksonville, Florida terminal.

   It is further agreed that in the event Local 512 is successful in the card check provided for above, the following terms and conditions shall thereafter apply:

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a. All owner-operator drivers shall be permitted to continue under the terms of their current owner-operator contract with Pilot Freight Carriers, Inc. until March 31, 1976.

b. It is also agreed that the terms of the National Master Freight Agreement shall apply, as amended, by deleting Article 2, Section 3 (Non-Covered Units), Article 3, Section 1(a), paragraph 2 (Recognition), Article 22 (Owner-Operators), Article 23 (Separation of Employment), Article 33 (Cost of Living) and amend Article 39 (Duration) to become effective August 15, 1974.

c. *Road owner-operators:* The terms of the Southern Conference Road Supplemental Agreement shall apply, as amended, by deleting Article 42, Section 4 (Seniority), Article 48 (Lodging), Article 50 (Paid For Time General), Article 51 (Mileage and Hourly Rates), Article 52 (Guarantees), Article 53 (Subsequent Run), Article 54 (Sleeper Operation), Article 55 (Owner-Operators), Article 56 (Vacations), Article 57 (Holidays), Article 60 (Steel Haul Only), Article 61 (Perishable Commodities Only), Article 62 (Funeral Leave), and amend Article 58 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 59 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

Also, where there is an increase in the Company's freight tariff rates a like adjustment will be made

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in the mileage rates and/or other allowances provided under the owner-operator's contract referred to in sub-paragraph (a) above. (I.E. — a 5% increase in the freight tariff rate would result in a 5% increase in the mileage rate; thus, a 34¢ per mile rate would be increased by 1.7¢ per mile).

d. *Local Owner-Operators:* The terms of the Southern Conference Local Supplemental Agreement shall apply, as amended, by deleting Article 52 (Vacations), Article 53 (Holidays), Article 54 (Paid-For Time General), Article 55 (Wages and Hours), Article 56 (Leased Equipment), Article 57 (Funeral Leave), and amend Article 50 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 51 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

Also, where there is an increase in the Company's freight tariff rate it will automatically reflect an increase in compensation under the owner-operators' contract referred to in sub-paragraph (a) above.

3. Any owner-operator driver who desires to cancel his lease agreement prior to March 31, 1976 may do so by giving the Company seventy-two (72) hours' written notice. At the time of giving such notice the owner-operator driver must also indicate if he desires to be placed on Company equipment.

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Where any owner-operator driver elects to cancel his lease and be placed on Company equipment, he shall work under all the terms of the National Master Freight Agreement, except that Article 2, Section 3 (Non-Covered Units) and Article 3, Section 1(a), paragraph 2 (Recognition) shall not apply. Such owner-operator driver shall also work under all the terms of the appropriate Southern Conference Supplemental Agreement (local or road), except Pension payments shall become effective March 1, 1976 and the amount shall be $22.00 per week.

4. This agreement shall become effective immediately upon ratification by the members of 512 and all picketing of Pilot Freight Carriers, Inc. by 512 shall cease immediately, and in no event later than 12:00 o'clock Noon on August 17, 1974.

For Pilot Freight Carriers, Inc.
PERCY J. LONG
Dir. of Labor Relations

For Teamsters Local Union 512
JAMES H. WHEELER
Secretary Treasurer

August 15, 1974

To: Pilot Freight Carriers, Inc.
This is to verify that the members of Teamsters Local Union 512, and employees of Pilot Freight Carriers, Inc.,

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ratified Memorandum of Agreement between Pilot and 512 dated August 15, 1974.

JAMES H. WHEELER
Secretary Treasurer
Business Manager

August 15, 1974

Memorandum of Agreement between Pilot Freight Carriers, Inc., and Teamsters Local Union 512, Jacksonville, Florida.

Pilot Freight Carriers, Inc., hereby recognizes Teamsters Local Union 512, Jacksonville, Florida, as the exclusive bargaining agent for all drivers (Local and Road) at the Jacksonville, Fla. terminal.

For Pilot Freight Carriers, Inc.,
PERCY J. LONG
Name
Dir. of Labor Relations
Title

For Teamsters Local Union 512
JAMES H. WHEELER
Name
Secretary Treasurer
Title

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APPENDIX B

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223 NLRB No. 41

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

PILOT FREIGHT CARRIERS, INC.
AND BBR OF FLORIDA, INC.

and

Cases 12—CA—6267 and
12—CA—6288

TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS
LOCAL UNION NO. 512, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA

PILOT FREIGHT CARRIERS, INC.

and

Case 12—CA—6384

TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION NO. 512
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge Phil Saunders issued the attached Decision in this proceeding. Thereafter, the Respondents and the General Counsel

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filed exceptions and supporting briefs and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[1] only to the extent consistent herewith.

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[1]The General Counsel and the Charging Party have excepted, *inter alia* to the Administrative Law Judge's finding that Lane's statements that he had spent $10,000 in attorney's fees to counter the Union that otherwise would have gone to the employees was not unlawful. The Administrative Law Judge held that Lane had the rights to spend as much as he chose for an attorney and that whether or not any saving in that respect would have been passed on to the employees was speculative and solely in the control of management. We do not quarrel with the Administrative Law Judge's observation on the rights of employers to pay their attorneys, with his conclusion that it would be speculative to conjecture on who would benefit from any saving, nor even with his more questionable and ambiguous observation concerning the control of management over the disposition of any such saving—which is incorrect to the extent it might imply that an employer has a unilateral right to fix wages once the employees have selected a bargaining representative — but that is all beside the point. The point, and the vice of the statement, is the assertion that but for the Union the employees would have received $10,000 and the implication that further union activities would deprive the employees of pay they

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Although holding that a bargaining order was warranted under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969), the Administrative Law Judge found it unnecessary to decide whether or not the Respondents had violated Section 8(a)(5) of the Act, on the basis of *Steel-Fab, Inc.*, 212 NLRB 363 (1974), and dismissed the 8(a)(5) allegations. Since the Administrative Law Judge's Decision issued, the Board has reconsidered the policy enunciated in *Steel-Fab* and substantially modified it, concluding that finding violations of Section 8(a)(5) in *Gissel-type* refusal-to-bargain cases are not superfluous. *Trading Port, Inc.*, 219 NLRB No. 76 (1975).

Accordingly, and for the reasons fully set forth in the body of the Administrative Law Judge's Decision, we specifically adopt paragraph 6 of his Conclusions of Law and hold that the Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union on and after February 14, 1974, the date of the Union's demand for recognition. At that time the Union possessed a majority of authorization cards from employees in the unit

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might otherwise receive. It is always speculative whether or not any promise of benefit or threat of reprisal will be carried out. We conclude that the statements violated Sec. 8(a)(1) of the Act and shall amend the Order and notice accordingly.

We also find merit to exceptions to the omission of the unit description, the name of the Union, and certain standard provisions from the Order and notice.

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's rejection of the Respondents' defense that the Union discriminates against minorities.

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found appropriate and events rendering a free and fair election unlikely or impossible had already occurred. Under *Gissel, supra,* an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by cards, whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain.

Amended Remedy

Add the following to the third paragraph of the section of the Administrative Law Judge's Decision entitled "The Remedy."

"In addition, the Respondents shall make each of the unfair labor practice strikers whole for any loss of earnings suffered by reason of the Respondent's refusal, if any, to reinstate unfair labor practice strikers in the manner described above, by payment to him or her of a sum of money equal to that which he or she would have earned as wages during the period beginning 5 days after the date on which such employee applies for reinstatement and ending on the date which Respondents offer to reinstate such an employee. Backpay, where due, shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and shall include interest in the amount and manner set forth in *Isis Pumbing & Heating Co.,* 138 NLRB 716 (1962)."

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ORDER

Pursuant to Section 10(c) of the Natonal Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Pilot Freight Carriers, Inc. and BBR of Florida, Inc., Jacksonville, Florida, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating their employees about their union activities.

(b) Threatening employees with discharges because of their union activities.

(c) Announcing and enforcing a rule prohibiting solicitations for the Union.

(d) Discouraging membership in the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in regard to their hire and tenure of employment or any term or condition of employment.

(e) Threatening to withhold benefits because of the union organizing campaign.

(f) Refusing to recognize and bargain with Truck Drivers, Warehousemen and Helpers Union No. 512, affiliated with International Brotherhood of Teamsters, Chauf-

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feurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in a unit of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of or at Pilot's Jacksonville, Florida, terminal, including regular part-time employees, but excluding casual employees, coordinators, office clerical employees, guards, and supervisors as defined by the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate Melvynn Johnston to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(b) Reinstate upon their unconditional application to return to work the unfair labor practice strikers to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from any failure to reinstate them, as provided in "The Remedy."

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(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due under the terms of this Order.

(d) Upon request, recognize and bargain with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the above-described unit respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at their terminal in Jacksonville, Florida, copies of the attached notice marked "Appendix C."[2] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are

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[2]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent have taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D. C. March 25, 1976.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)